

# CHILD RELATED POLICY AND LEGISLATIVE REFORMS IN MALAYSIA

Rojanah Kahar<sup>1</sup>  
Najibah Mohd Zin<sup>2</sup>

---

## Abstract

This paper examines the existed child related policies and child welfare laws in Malaysia with regards to children's rights with special concern to the implementation of diverse child related policies which affect child best interest in the Malaysian context after the ratification of United Nation Convention on Rights of a Child (UNCRC) in 1995. Content analysis of secondary data has been utilized in order to understand the implementation of diverse policies and laws within the purview of family law development and other related areas that affect child best interests. This study established that diverse social policies and numerous child related legislations addressed and accommodated the best interest for children both for Muslim and non Muslim since both groups had different laws. Nonetheless, the absence of child-focused policy in Malaysia affects the smooth implementation of policies and laws which relates to the best interest of children. Thus, child-focused policy is important to protect children's best interest in all areas including family law. Therefore it is anticipated that the introduction of National Child Policy and National Child Protection Policy in 2009 would bring positive changes to the Malaysian children.

**Key Words:** social policy, child related laws, family law, child best interes

## Introduction

Children have been considered as a valuable asset for the nation. Therefore regardless of different cultural background, race and faith, Malaysian children had received the ultimate attention from the government. Prior to the introduction of National Child Policy in 2009, Malaysian policies related to children are scattered and largely incorporated into the general social policies such as the National Welfare Policy, National Policy on Women and National Social Policy. In order to strengthen the implementation of core development policies and social policies, several treaties and conventions have been signed to show the government's commitment in upholding children's rights. The signatory of international Convention on the Rights of a Child (UNCRC) in 1995 (Aneeta, 1999; Sayed Abd Rahman, 1996) and the Child Care and Protection of the Islamic

---

<sup>1</sup> Senior Lecturer, Department of Human Development and Family Studies, Faculty of Human Ecology, UPM

<sup>2</sup> Associate Professor, Department of Islamic Law, Ahmad Ibrahim Kuiliiyyah-of Laws, IIUM

World or Rabat Declaration in 2005 are good examples. According to Abd Aziz (2009) the Rabat Declaration was the first Islamic document to approach in an integrated and comprehensive manner the general rights of children, based on the principles of Syari'ah. It also attempts to adhere with the international law and the Universal Declaration of Human Rights, international instruments and declarations of child. This paper attempts to examine the existed child related policy and legislative changes as regard to children best interests especially after the ratification of UNCRC in the context of education, family law and child protections.

### **Children's Rights and Best Interests**

Protecting children's rights and their best interests is vital for child development. This principle has been addressed in most jurisdictions which range from the right to life, identification, legitimacy and good name, breast feeding, shelter, maintenance, support, religion and good upbringing. Protecting of a child from any maltreatment by reason of his physical and mental immaturity was highly emphasized in the earliest text on rights of a child known as Declaration of Geneva 1924 (Veerman, 1992). Although the GD 1924 provides the legal status of a child based on its five principles, it only emphasized on the duties of adults towards children (Prout, 2005; Fortin, 2005). Therefore, the loopholes in the GD 1924 led to the passing of the United Nation Declaration of the Rights of the Child 1959 where the concept of 'special protection' as emphasized in the GD 1924 was included in the UNDRC 1959 (Verhellen, 2006). According to Van Buereen (1995), the preamble of the UNDRC 1959 declares that children need special safeguards and care including appropriate legal protection before and after birth. Thus, a child is entitled to a name and nationality, adequate nutrition, housing, recreation and medical services, education (Principle 4-7 of the UNDRC 1959). The concept of special protection for children under GD 1924 and UNDRC 1959 was further developed in the United Nation Convention on Rights of Child 1989 (UNCRC 1989) by adding the concept of freedom and has been considered as the most authoritative and comprehensives statement of fundamental rights of children covering civil and political, social, economic, cultural, recreational and humanitarian rights (Alston, Parker & Seymor, 1992). It has been noted by Detrik (1999) that 54 articles in the UNCRC 1989 contains rights relating to every aspects of children's life in terms of rights to survival, development, protection and participation which the best interest of the child is the paramount consideration.

"In all actions concerning children, whether taken by public or private welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration"

(Article 3, UNCRC 1989)

The principle of best interest of a child as enshrined in the UNCRC has been used as a guiding tool in addressing children's rights and their best interests in most jurisdictions including Malaysia. According to Aneeta (1996), initially Malaysia's 12 reservations were based on the efforts of Special Committee that had been formed to study the provisions of the UNCRC on its constitution, policy, law and socio-culture in the multi-racial country. Working on a premise that Malaysia is a multi racial country which comprises various races, customs, religions and practice, the current reservations are article 1, 2, 7, 13, 14, 15, 28(1)(a) and 37 (Sayed Abdul Rahman, 1996).

### **Child Related Social Policies and Children's Best Interests**

Social policy is a study on society which covers multi-discipline approaches (Titmus, 1974). According to Siti Hajar (2002) social policy in the Malaysian context relates to the social interventions which have been formulated by specific sectors in the Government as a monitoring mechanism, surveillance, improvement, protection and intervention or control the socio-economic lives and politics in order to strengthen and complementing the core development policies. She further states that any interpretation as regards to social policy must emphasize on the social context background, time frame, need, problems, value, ideology and idea, intervention, methods and different approaches and changes within the society.

Malaysian social policies range from functional services related to health, education, employment, social protection and poverty reduction to categorical issues of women and youth. Therefore, the formulation of Malaysian social policies has evolved within the context of political stability (Hazim Shah & Phua, 2004) and the absence of serious natural disasters or debilitating armed conflict. It is also supported with strong economic and political activity because politics matter a great deal and political activity is afforded no little significance in the policy making process in particular and the shaping of social policy in general (Ringgen, 1986). Therefore, social policies objectives and strategies address various issues such as housing, unemployment, crime, drug addiction, family violence, ethical and community relations, children, the aged and the disabled (EPU, 2009) and normally will be executed and implemented through four main strategies namely plan, project, programs and legislations.

### **Child Related Policies after Independence**

During the past decades, children's rights have become significant field in Malaysia. In the absence of child focused policy prior to its formulation in 2009, the National Plan of Action for Children Survival has been used as a blueprint in all matters pertaining to children (Zaharah, 2002; Kammerman, 2002). On top of that, the National Economic Policy became the backbone in achieving all those plan of actions. Additionally, five year development plans supported the implementation of the plans. It is observed that children's matters were largely incorporated into family-friendly social policies such

as the National Education Policy, the National Population Policy, the National Welfare Policy, the National Policy on Women and the National Social Policy.

The National Education Policy was the earliest social policy being introduced during the Second Malaya Plan (Tie Fatt Hee, 2002). This policy aims to provide individuals who are intellectually, spiritually, emotionally and physically balanced and harmonious, based on the firm belief in and devotion to Allah (Nik Aziz, 1994). It is clear that education has been used as a medium of intellectual development and this policy was in fact consistent with the Islamic principles whereby preservation of intellect is one of the objectives of *maqasid al syari'ah*. The Malaysian education policy encourages children at the age of 7 to receive formal education. This principle is consistent with Islamic point of view which determines that a child's right to receive formal education begins at the age of 7. The textual foundation is derived based on a *hadith* which determines that it is an obligation for a father to teach the religious education to his child through prayers (Abdullah Nasih 'Ulwan, 1988; Abdulah Nasih 'Ulwan, 2001).

In implementing the education policy, the Education Act 1961 (EA 1961) was passed and determined Malaysia's education policies for over three decades until it was repealed by the Education Act 1996 [EA 1996]. If the EA 1961 emphasized on the role of Malay language as the national language and its function as a medium of instruction to promote a national integration, the EA 1996 considered the influence of globalization and the impact of development in information technology in the knowledge economy. According to Habib & Megat (2008), the EA 1996 was implemented with the primary purpose of addressing the challenges posed by these two global developments. The EA 1996 also incorporates preschool education within the national education system whereby it has been offered by both government agencies and private sector.

Another child related policy is the National Population Policy [NPP]. Prior to the introduction of NPP, the growth of birth rate has been identified as a problem in Malaysia which led to the introduction of the Population and Family Development Act 1966 [PFDA 1966]. By virtue of PFDA 1966, the National Family Planning Board [NFPB] was established in order to implement the national family planning program in which Malaysian couples were encouraged to have fewer children in order to reduce the annual growth rate from 3% to 2% within 20 years. Nonetheless, with the aim of having more people, the policy of limiting child births was reviewed in 1984. The new policy was targeted to have 70 million of the Malaysian population by the year 2100. Consequently, the NFPB was renamed the National Population and Family Development Board [NPFDBP] which focused more on birth spacing and family welfare rather than limiting child births (NFPDB, 1984). Therefore, various programs and plans have been articulated by the NPFDB in order to achieve the objectives.

Despite its general focus on the family development, the NPP also aims at increasing awareness, knowledge and practice of a healthy, stable and to harmonize the

family life thereby creating a quality population through strengthening the family institution. Under its six guiding principles which covers attainment of quality education; role of woman in development; encouragement of family to take care of elderly; developing programs for survival, protection and development of child; encouraging family and community and the Government's support to the vulnerable and disadvantage group, it shows government's efforts in addressing children best interest (Raj Karim, 1993). Nonetheless, the target to have 70 million populations was quite ambitious and might not be achieved due the fertility crisis due to rapid economic growth in Malaysia (Mohd Fadzli, 2006). The fall of fertility rate contributed through late marriages among better educated women in Malaysia, because with better education, the late marriage has become prevalent and thus, shortened the childbearing span for women and resulted in fertility decline. Having more population does not guarantee it quality. Thus, with the intention to have good nation building, the National Social Welfare Policy was introduced.

The formulation of the National Social Welfare Policy in 1990 [NSWP] emphasizes on the importance of family in nation-building which include programs for the survival, protection and development of children. The concept of 'caring society' was introduced when it states that this policy promotes a stable, self-reliant and caring society for the nation's progress. Besides that, the policy advocates greater assistance to the handicapped, the disabled and destitute as well as the unfortunate to enable them to participate in and benefit from socio-economic development. As the NSWP addressed the need to give priority to the national development and the well being of the people, the development programs have been directed towards uplifting the potential of all groups of society. The NSWP is very much welfare oriented and always associated with social work practice in Malaysia (Aishah Edris, 1997). Department of Social Welfare (DSW) has been empowered in implementing the strategies that has been developed under NSWP. Indeed, the policy has strengthened the role of DSW in dealing with social welfare services. Through the concept of social welfare (Abd Rahim, et.al, 2008), the DSW has been used as a tool for promoting stable and self-reliant society by the social workers in Malaysia (Sayed Abd Rahman, 2003). The DSW is responsible in administering the child adoption through the Adoption Act and the Registration of Adoption Act.

Another important policy which indirectly affects Malaysian children is the National Policy on Women which was formulated in 1989 [NPW 1989] with the objective to enhance the role of women and ensure their integration in the process of development. The idea of protecting women is due to the fact that the women's wellbeing is always linked with children, hence the advancements made in promotion and protection of the right of women will benefit children as well. In this regard, the National Action Plan for the Advancement of Women was formulated to implement the women's development policy (Fatimah, 1999). Therefore, serious efforts have been taken by government in ensuring that Malaysian women and her family dependent children are better protected in which the NPW had addressed and highlighted issues on child abuse, child labor, childcare,

abandoned children, missing children and gender preferences. Muslim and non Muslim women are governed separately by various laws such as Islamic Family Law Act, the Law Reform (Marriage and Divorce) Act 1976, Married Women Act, Married Women and Children (Maintenance) Act 1968 and Domestic Violence Act 1994. To support the NPW, the ratification of Convention on the Elimination of all Forms of Discriminations against Women [CEDAW] has significantly advanced the rights of women which in turn have also a positive impact on children (Wan Isma & Junaidah, 2008). The ratification of CEDAW was made on 5<sup>th</sup> July 1995 with several reservations which states that:

“The Government of Malaysia declares that Malaysia’s accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic *Shari’ah* law and the Federal Constitution of Malaysia. With regards thereto, the Government of Malaysia does not consider itself bound by the provisions of Article 2(f), 5(a), 7(b), 9 and 16 of the aforesaid Convention”.

According to Abdul Ghafur (2007), Malaysia’s reservation to several articles in CEDAW, are based on the grounds that they are in conflict with Islamic law and Federal Constitution. However, following the Beijing Conference in 1997, Malaysia reviewed its reservations to CEDAW and as a result, subsequent withdrawal of some of the reservations was made on 6<sup>th</sup> February 1998 where the “Government of Malaysia withdraws its reservation in respect of Article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h). It has been noted by Eva Brems (2001) that reservations to CEDAW articles, has resulted some criticisms at the international level which alleged that the remaining reservations continue to inhibit the realization of women’s equality, abandoning Malaysia’s responsibility to modify social and cultural patterns of conduct that are based on customary practice of stereotype and inferiority, refusing women the right to formulate government policy and hold public office, and failing to enforce equal rights for women in marriage.

Although the government partially withdrew its reservation, it upheld reservations on the articles on eliminating social and cultural discrimination against women, on providing women equal rights to participate in government and to extend citizenship to their children and on assuring equal rights in marriage, divorce and custody. To certain extent, there is a proposal from the Committee’s Concluding Comments which urged the Malaysian government to withdraw its remaining reservations, particularly reservations to Article 16 which is considered ‘contrary to the object and purpose of the convention.’ The Committee has indicated that the current dual family law system has led to the continuing discrimination against women particularly in the field of marriage and family relations. Since Islamic countries including Malaysia are being caught in legal dilemma, it was suggested that CEDAW should accommodate Muslim countries to be able to comply with the Islamic principles and the readiness of Islamic countries to accept the liberal interpretation of the Islamic family law without neglecting the fundamental aspects of Islamic law or Syari’ah.

(Abdul Ghafur, 2007). Nonetheless for National Policy for Woman was revised in 2009 in order to give more recognition and protection to Malaysian women.

### **Child Related Policies after 1995 and Subsequent Changes**

Despite the reservation to article 28 of CRC, child's right for intellectual development was highly emphasized by the Malaysian government after 1995. The Education Act 1996 that regulated the provision of preschool, primary and secondary education was revised in the Education Act 1996 (Amendment) 2002. The review was to enable the implementation of compulsory education at primary school level. By virtue of the Education (Compulsory Education Order) 2002, it directed the Malaysian parents to ensure that their child has the right access to primary education when the child reaches the age of six or on the first day of the current school year when the child would be six years old. Therefore, starting from 1<sup>st</sup> January 2003, every child in Malaysia beginning at age six, regardless of sex, social and economic background and residential locality has the right to primary education. The announcement of the government which allowed a child with no birth certificate to enroll to secondary school on condition that one of the parents is a Malaysian citizen indicates the State try to uphold child best interest as promoted by CRC and Islamic law. Although this drastic decision provides different interpretation with regard to policy process, somehow it recognizes child's rights to education. Failure to have birth certificate does not jeopardize children's best interests and this decision affirms the government's efforts to continuously improve the education system in line with the earlier policy being drafted and formulated in which the economic wellbeing of Malaysian children was consistently improving.

It is noted that the formulation of new National Social Policy [NSP] in 2003 has been regarded as important agenda for the human capital especially to the Malaysian children and at the same time had strengthened the other plan of action as embedded in previous social policies. Noting the fact that the NSP is important, a National Convention Social Development Agenda was organized by the Ministry of Women, Family and Community Development in 2007 where all national policy makers, academicians and government officers had attended the function at Kuala Lumpur. It is stated the NSP plays a master-key role which comprises of philosophy and all fundamental social development policies, stressing on the Constitution, *Rukun Negara* and Vision 2020, including the nation's commitment on an international level. Although the NSP has helped to consolidate the Government's commitment towards the promotion and protection of the rights of children through its programs and related legislations, nonetheless children's issue were still escalating. It has been noted that the NSP failed to address important issues as regards to children's best interests (Roundtable Discussion on NSP, 2010).

## **Children's Best Interests under Family Law in Malaysia**

The ratification of UNCRC in 1995 also brought significant changes for the family law development in Malaysia as regards to child best interests. Despite the non existence of child-focused policy in Malaysia, a number of laws were amended in order to give more protection to young members in both Muslim and non Muslim families. Therefore, in the late 1990s, there were many reforms on the law related to family and children such as the Guardianship of Infant Act 1961 (GIA 1961), the Distribution Act 1958 (DA 1958) and the Adoption Act 1952 (AA 1952). The reasons for the amendments were to strengthen the administrative process for better protection of children and to regulate more efficient implementation of laws. The reasons could be linked to changes in the micro system of human life such as increasing number of single families and a growing number in child abuse and neglect cases.

The call for reform of the GIA 1961 was started in 1974 but the Bill was tabled to Parliament in 1999. In order to overcome custody dispute between parents in the event of divorce, the proposed Guardianship Act 1961 (Amendment) Bill was to allow joint guardianship of children in matters relating to immigration and school registration (Noor Aziah, 2007). The bill was proposed based on the premise of dissatisfaction amongst single parents. In practice, the father is entitled for the guardianship while the mother retains the right for custody of children. Since the father is the legal guardian under the old law, his signature is needed in most of the application form for children under 18 years old and has caused serious problems amongst single mother in locating the father when it relates to application of Malaysian passport in the Immigration Department, processing an identification card for 12 years old child and school registration. Thus the new amendment of section 5 of GIA 1961 (Revised 1988), empowered both parents as joint guardians and they shall have equal rights in matters relating to custody and upbringing of the child. The amendment confers equal rights to the mother on equal authority as the father and facilitates the relationship between mother and father for the welfare and best interest of their children after parental divorce (Seridevi, 2008). In addition, the new amendment law provides jurisdiction to the court to appoint a guardian of the infant and property in the event that both parents have died without appointing testamentary guardian (Section 7, GIA 1961).

Another significant reform for non Muslim children was pertaining to the Distribution Act 1958 [DA 1958]. Although the act was not meant for children, however it indirectly affected children in the event of succession. Prior to the amendment, there was unequal sharing between survivors to the scheme of interstate distributions for non Muslims (Balan and Rafiah, 1988). The amendment of the DA 1958 was to provide for equal inheritance share for the surviving members, and granted children the right to inherit from their mothers as well as from their fathers. It is noted that the Distribution (Amendment) Act 1997 [DAA



1997] has not amended the definition of child as mentioned under section 3. According to Seridevi (2010) the term issue or children in the DAA 1997 retains the legitimate child and adopted child and excludes the illegitimate child as the rights of illegitimate children are 'protected' by the Legitimacy Act 1961 (section 11) which provides for the right of the illegitimate child to succeed the property of his/her mother where the mother has died without any legitimate issue surviving her. As regard to the rights of surviving spouse, the current provision of the Distribution (Amendment) Act 1997 states that "If an intestate dies leaving a spouse and no issue and no parents, the surviving spouse shall be entitled to the whole estate (section 6)". Prior to the amendment of DA, the surviving husband was entitled to the whole of the deceased wife's estate even though she was survived by her child or children or her parent or parents. Thus, with the new amendment, the husband may only claim the whole estate if the deceased intestate wife left no children and no parent or parent.

It is noted that for the purpose of succession, the law requires a formal legal relationship between parent and a child (Sujata and Yong, 2004). Under section 7 of DAA 1997, the beneficiaries of an intestate estate especially child, has the right to take the share of the estate in the form of statutory trusts. In this situation, the interest of a child or 'an issue' in the intestates estate is contingent and is held a trust for him/her until he/she attains the age of majority or marries under the age. The new law clearly stipulates that the child will be entitled to the entire estate, if the mother (woman) leaving only an issue or a child. In addition, the right of the surviving children is further protected in the DAA 1997 as the provision reads "If an intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds". Therefore, this provision gives better protection as compared to the previous law where the father will be entitled to the whole estate even though the wife is leaving younger children. Although children were entitled to the whole estate in the form of trusts under the old DA 1958, the share is reduced to two-third of the estate and the remaining one-third is transferred to the grandparent or grandparents. Moreover, the children will be entitled to one-half if the mother leaves a surviving husband and parent/parents. With the new amendment law, it serves the best interests of the child under the inheritance law for non Muslim.

In another development, cognizant with the welfare of adopted child in a family, the law on adoption has been revised since its introduction in 1952 and the procedure was made tighter in order to protect welfare of non Muslim children in Malaysia (Shamsudin, 2009). It has been contended that the adoption process had caused psychological distress to the adoptive parents from keeping the secret from their adoptee. It is noted that National Registration Department [NRD] together with Department of Social Welfare try to uphold the principle of best interest of the child in the adoption process. The practice of NRD is to issue birth certificate to a newborn child and adopted child. Hence once a child is

being adopted, his birth certificate will be replaced with a new certificate which deletes the original status of the child based on the new amendment of to section 25 of AA 1952.

Although the introduction of new section 25A in the AA 1952 (Amendment) creates a new phenomenon and brought a new paradigm and invention, nonetheless it has been argued that the adoptee's right to search for his past family back was deprived by the law. According to Shamsudin (2007), the adopted child will lose not only the birth parents but also all information about birth parents, birth kin, racial identity, medical history and other basic existential information which non-adoptee takes for granted. Therefore, the implementation of the law and the policy of the government, to a certain extent had caused social injustice to the adopted child. The right for identity will be lost if the law is not properly practiced. From the above discussion it can be established that legislative amendments that have been made to the civil family law in Malaysia, can be associated with the social needs of the non Muslim child which arise from the concern of public interests. The current law governing children in Malaysia proves that the welfare of an adopted child is protected through strict procedure as stipulates under the AA 1952. It is undeniable that the process of adoption changes the life of an adopted child and facilitates the administrative process involving schooling, national identity and application for Malaysian passport, but it shall not be exercised freely without good and effective monitoring system.

On the other hand, the implementation of RAA 1952 brought another challenges with regard to the right of child since the law was applicable to Muslims. Despite having good legal provisions which catered the best interests of the an adopted child, it is observed that there is conflict of philosophy between NRD and the Religious Ruling Committee with regards to the issue of adoption among Muslim families. If the adopted child was an illegitimate child, the Religious Ruling Committee ruled that the name of the biological father for Muslim illegitimate child would be replaced with the word '*Abdullah*'. It is noted that the word '*Maulana*' was suggested in the registration of an adopted child which might include illegitimate child. Subsequently, the NRD allows the name of the adopted child to be combined with his or adopted father and this had prompted some debate among Malaysian.

It was reported that the NRD's policy does not comply with the *fatwa* made by the Religious Ruling Committee. The *fatwa* stated the prohibition to combine the adoptee's name with adoptive father without using 'bin' @ binti or the word *Abdullah*" (JAKIM, 2003). Consequently, the Ruling Committee warned the NRD to follow the *fatwa* (ruling) made by them pertaining to the naming of the adoptee. The Minister of Home Affairs also asked the NRD to take an immediate action regarding the above issue. Furthermore the Minister at the Prime Minister Department at that time was of the opinion that the reason given by the NRD cannot be accepted as it could cause long term implications. It is wise to consider what has been stated by Suad, et.al, (2003) that "in order to protect the child from living with the stigma of illegitimate birth, the authorities created such identities for the child".

In regard to the issue of registration of adoption for Muslim, the new procedure as announced by the NRD was not discussed with the Religious officers in Malaysia (Salleh Buang, 2007) although it aims to settle the society's sensitivity on the issue of adoption. It should be noted that when the NRD is not serious with the usage of *bin* or *binti*, it indicates that the level of sensitivity among the government agencies in implementing Islamic law to Muslim children is still questionable. Consequently, it reflects some absurdity in the current practice of adoption especially that deals with Muslim children. Furthermore, the situation is getting worst when the level of illiteracy with regards to the provisions of legislations among Malaysians, are still low, regardless of the notification through government gazette. Noting that Islamic law which is applicable in Malaysian is adhering to the *Shafi'e* school of law, the government should be more concerned with the application of Islamic law for Muslims in the case of child adoption.

As the current RRA 1952 only provides for procedural matters, it has been suggested that Malaysia should have a more comprehensive law on the adopted Muslim child. It has been proposed by Azizah (2007) that Muslim Adoption Child Act should be enacted in order to give more protection to Muslim children where the Islamic rules and principles pertaining to adoption can be regulated effectively and the welfare of children is protected according to Islamic law. The Malaysian practice is different with other Muslim countries such as Jordan which totally prohibits child adoption. It is noted that despite numerous academic legal writing pertaining to the issue of adoption have been published, little is taken into consideration and be accommodated into the government policy. Therefore legal and social issues pertaining to adoption of a child is never settled amongst Muslims and it is suggested that the concept of *kafalah* and fosterage should be further emphasized by the government and legislature.

### **Laws Governing Maintenance and Financial Support of Children**

Children's right for maintenance was protected in legal provision as stipulated by both laws for Muslim and non Muslim in Malaysia. During post 1995, the non Muslim was still governed by the Family law Reform (Marriage and Divorce) Act 1976 [LRA 1976], Married Women and Children (Maintenance) Act 1950, Married Women and Children (Enforcement of Maintenance) Act 1968. Meanwhile, the Islamic Family Law Act [IFLA] and Enactment provided comprehensive provisions on maintenance and financial support for Muslim children.

As provided under the LRA 1976, the non Muslim child shall be given maintenance by his or her father. The law also stipulated that the right for maintenance should be exercised until the child reached 18 years old as reflected in the case of *Kulaisingam v. Rasamah* where the court ruled that the right of maintenance was exclusively given to child under the age of 18 years old. However the decision in *Ching Seng Woah v Lim Shook*

*Lin* indicates the best interest of children is interpreted to cover the right for education whereby the court had ordered the husband to pay RM 100,000 to his female children, medical expenses and their tertiary education. The decision of Karunairajah has been followed in the case of *Shudesh Kumar al Moti Ram v Kamlesh a/p Mangal Sain Kapoor*. In this case, it was held that since there is no legal duty on a parent to support children beyond the age of eighteen years, the court should make no order as to maintenance for the children although the petitioner had solemnly undertaken to see the children through to the completion of their tertiary education. The judges in the above mentioned case was of the opinion that the Islamic Family Law (Federal Territory) Act 1984 was more advanced than the civil courts. The above discussion established that right for education is part and partial of maintenance for the Muslim children, but not in the case of non Muslim children. In this regards, the IFLA 1984 gave the power to the court to extend the financial support until the child completed his or her tertiary education. Despite the current provision in the IFLA 1984 which stipulates that the order for maintenance shall expire on the attainment by the child of the age of eighteen years, the Selangor Islamic Family Law Enactment 2003 makes a move to regulate that children's right for maintenance extended after the age of 18 for further education and training. It can be inferred that the duty of a non-Muslim parent to maintain his or her child is only up to the age of eighteen, unless the children are under physical or mental disabilities. It has been suggested that parliament should take a positive step to amend section 95 of the LRA 1976 following Singapore law and at the same time to be consistent with the provision as stipulated in section 79 of the IFLA 1984 (Seridevi, 2008).

It is evident that children's welfare and rights have been tackled by Islamic Family Law Act and Enactments through legal provisions. However, the implementation of Islamic Family law Act and Enactments are facing challenges as regards to children's welfare. It is contended that the implementation and enforcement of law is not effective as regard to children's financial wellbeing. Although the law is regulated and the Shariah Court has the power to order the father to pay the child support, it is evident through empirical research that the refusal of father to comply with the court's order in paying child support has caused financial problems to the single mothers who are always given the right of custody (Norasmaliah, 2000). Furthermore, the non-custodial fathers have been quite reluctant to have good contact with children and this have caused negative results in terms of payment of child support (Norasyikin, 2006).

Cognizant with the welfare of children upon divorce, the Islamic Family Law Family (Federal Territories) Amendment Bill 2005 was introduced which aimed at protecting the interests of wives and children on maintenance and proposed for division of matrimonial property in case of polygamy. However, it was opposed by certain groups as gender bias. It has been raised that the current practice failed to respond or cater the needs of the society's changing needs especially involving children. Although the child might

succeed in getting the maintenance order from the court, it does not guarantee that she or he will receive the actual payment from their father. In the absence of the tougher action and stubborn father, it is observed that the enforcement of maintenance order is yet to be effective and cause instability in the financial wellbeing of single mother and her children. It has been proposed that the role of the grandfather or the paternal uncle to be strengthened and they can be ordered to pay the child support in the event of non-compliance from the biological father (Nora Abd Haq, 2007). Furthermore, if the father negligently failed to comply with the court's order to pay to his children, he can be punished. Nevertheless, legal provision is meaningless without any actions being taken to impose it against the defaulting party. Although the law stipulates that under *Hukum Syara'* the duty to maintain or contribute to the maintenance is given to the male figures, the role has been transferred to *Baitul Mal* in the event if male descendent is unable to pay it. The establishment of Family Support Unit is the latest policy being introduced by the government in order to address the issue of maintenance among Muslim women and children in Malaysia (Mohd Naim, 2010).

### **Law governing Child Custody and Guardianship**

It is apparent that the best interest principle has been applied in the case of child custody and guardianship under family law both for Muslim and non Muslim. Despite the application of different laws, both legislations share the same principles which promote best interest of the child as paramount consideration. Thus, it has been argued that the laws are adequate to protect and promoted children's best interests. The application of Islamic law in matters pertaining to custody and guardianship of children has continued in all Islamic Family law Enactment in each state in Malaysia. Mothers are always preferred than fathers in the case of the custody of the infant with an assumption that it serves the best interest of the child and it has been the backbone of the custody law in Malaysia where the law has an influence of the Shafi'i opinion. It has been noted that the welfare of children is maintained but less effective due to different interpretation of best interest of the child by judges in Shariah court.

In the absence of any legal reforms to the Islamic family law in Malaysia, the child's rights for custody and guardianship retain the Islamic principle of Shari'ah as can be seen from judicial decisions in the Shariah courts (Najibah, 2007; Nora, 2007; Noor Aziah, 2007). As for Muslims, the legal provisions on custodial right are adequate as far as the best interest principle is in question. Lack of uniformity in practice by the courts which deal with family matters and children are claimed to be the contributing factors that affect the children's wellbeing in custody battle. This may be linked to the current practice of the Shariah Court in Malaysia as contended by Najibah (2005) that the current laws both for Muslims and non Muslims retain the traditional pattern of granting custody order, whereby the emphasizes is on the parental right rather than the parental responsibility.

The current trend in our society shows that the Shariah Court is quite reluctant in applying the concept of joint custody in the case of contested custody cases although it has been suggested by the academia lawyers. The cultural sensitivity proves to be the main obstacle in promoting the best interests principle in custody and guardianship of children in the Malaysian context.

With regards to the issue of parental responsibilities after divorce, PEMALIK proposes that parents contemplating divorce should be required to meet a panel expert to guide them through the divorce process. As for custody disputes in the Shariah court, it has been suggested that the application of *sulh* or Islamic mediation shall be exercised after the divorce (Normi, 2007). It is reasonable to say that the traditional approach of custody order contributes to the less effective implementation of *Shari'ah* law and the reluctances in adopting new interpretation to the existing law. It is observed that the opinion of Shafi'e school of law is prevailed although the law permits the interpretation of the provisions based on *Hukum Syara'*. In addition, the suggestion to have family court in Malaysia as a mechanism in addressing issues and problems regarding family and children's welfare started since in the early 1990s. To date, it is critical to set up this court in order to address the needs of children involved in custody battles. It is noted that many empirical studies have been conducted in Malaysia especially that deal with Muslim family (Rozumah, 1999; Rumaya, 2007) and propose certain reforms in order to overcome the issue of children's welfare or wellbeing. Unfortunately, those suggestions are still on the shelves and need further consideration by the relevant authorities.

Recently, the issue on the custodial right upon conversion of one spouse to Islam became critical in Malaysia. The foundation of conflicts is grounded on the provision that has been inserted in the Islamic Family law Act and Islamic Family Law Enactment which allows both the Shariah courts and the civil court to deal with conversion separately according to the jurisdictions of the parties. Since the non Muslim is governed by the GIA 1961 and the LRA 1976, they are subjected to civil court. The amendment to the GIA 1961 that accords equal rights of guardianships for both mother and father has changed the perception on traditional approach of custody order in case of non Muslims. On the other hand, Muslims can only go to the Shariah court and result in many ex-parte orders for custodial right in the Shariah court which is against the best interests of the child.

To date, there is no solution to avoid conflicting laws and jurisdiction as regard to the issue of conversion. Thus, simultaneously this will affect children's best interests of parent with different religion. To a certain extent, the judicial decisions of the civil court is conflicting each other. In the case of *Tang Sung Mooi V. Too Miew Kim*, the court decided that the Civil Courts would have jurisdiction to annul a marriage where one party was a non Muslim. The decision was further strengthened in the case of *Sharmala a/p Sathiyaseelan v. Dr Jeyaganesh a/l Mogarajah* when the order of custody which was

issued by the Shariah court was ignored due the jurisdiction of the Civil court. The issue of parental right to determine the religion of their children was left unanswered when the High Court held that a non Muslim mother was entitled to care and control of her two infant children despite the fact that the children were Muslims. This decision indicates that order has no legal effect upon the conversion of one parent to Islam.

After 10 years since the ratification of CRC, the Federal Court had again delivered a landmark decision when granting a Muslim man the right to unilaterally convert his minor children to Islam without his wife's permission. This publicized case has been criticized among the multi-ethnic society in Malaysia as not reflecting the spirit of human rights. The three judges unanimously agreed that the couple's marriage and matters pertaining to custody of their children could only be resolved in the civil court since the matrimony was contracted under the LRA 1976. Hence the Federal Court in the case of *Subashini a/p Rajasingam v. Saravanan a/l Thangatoray* decided that the civil court had exclusive jurisdiction in any case involving the dissolution of a civil marriage and dispute over the custody of children where one spouse had converted to Islam. In spite of the ruling, the quorum in a 1-2 majority dismissed Subasini's appeal to set aside the High Court's refusal to grant her an injunction order to stop the husband from dissolving their marriage in the Shariah court and converting their second son to Islam. The implication of the case is serious when the civil judges have openly conceded the supremacy of the civil courts to the Shariah courts. The judgment of Subashini's case shows that the issue of the clash of jurisdiction between civil and Shariah has not been satisfactorily resolved.

Despite the above conflict, the civil court awarded joint custody to both parents working on the premise that legal custody to both parents meant that they would agree on issues pertaining to education, religious freedom choice of religion and property, although the actual custody in terms of day care was given to the mother. It should be noted that the precaution by Justice Faiza Thamby Chik (2007) should be borne in mind when stating that "the non Muslim mother would lose the right to the actual custody if there were reasonable grounds to believe that she would influence the children's present religious beliefs or to make them eat pork etc." It seemed that the above judgment sound practicable and was in line with Islamic law, although it was silent on any suggestion or guidelines on how to ensure that the non Muslim mother would follow such restrictions.

However, this conflict can be resolved if the Shariah court sought other Islamic jurisprudence interpretation which is acceptable under *Hukum Syara'*. This is due to the fact that custodial right to parent of different religion is a question of *ijtihad*. The preference to the welfare concept in deciding custodial right in such cases may not necessarily be confined to religion alone, although religion is an important factor to be considered in a child custody dispute. Since the issue of conversion is not settled to date, especially when it pertains to the custodial rights of children, it has been suggested again that the opinion

of Maliki and Hanafi schools could be taken into consideration between parents to assist Shariah Courts in Malaysia (Najibah, 2007). In fact this provision has been regulated in the Muslim countries who apply Hanafi's school such as in Tunisia whereby the non-Muslim mother could be given custody and she would loss such right after the child reached 5 years old unless there was no fear of her being brought up according to the religion other than Islam (Rojanah, 2010). The issue of conversion of one spouse to Islam has given legal and social impact to Malaysian children. Thus, the legislators and policy makers should make progressive efforts in solving this problem. The position of Islam as the religion of the State must be respected and upheld. The most important factor to be considered is that the best interests of the child should be protected as required by *maqasid al syari'ah*.

### **Child Care and Protection Laws**

The introduction of Child Act 2001 was done on the premise that Malaysia realizes that many of its statutes do not conform to the UNCRC. The amalgamation of three Acts namely the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991 aimed at promoting children best interest in accordance with UNCRC. Thus, in order to show its seriousness in implementing and accepting the UNCRC 1989 as part of its law, the new CA 2001 retains the old Child Protection Act 1991's definition on child which covers children under the age of 18 years old (Sham, 2001). Therefore, the CA 2001 provides for offences regarding ill-treatment, neglect, abandonment or exposure of children to moral danger, children used as prostitute and beggars, children left without reasonable supervision and unlawful transfer of possession, custody or control of children. This CA 2001 is said to be comprehensive and covers all areas of law relating to children (Jal Zabdi, 2008).

The rationale of introducing the Child Act 2001 was on the premise that it would protect children under eighteen years old who have been neglected or abandoned by their parents or guardians. It has been noticed that certain anomalies still remain from the repealed act. There is a difference between a child in need of care and protection (for abused) children and children who are in need of protection and rehabilitation (child exploited for prostitution). It has been assumed that the behavior of victim of sexual abuse contributes towards the crime of being prostitute. Consequently, children who have been abused including those exploited for prostitution need care and protection (Sham Kassim, 2001). It should be noted that the provisions in the CA 2001 are based on the four core principles of the UNCRC i.e no discrimination, the best interest of the child, the right to life, survival and development and respect for the views of the child. The CA also covers diverse important issues on children that range from liability and responsibility of parent or guardian, accountability to inform on suspected abuse case, the establishment of Courts for Children, procedure, proceedings, penalty and so on (Norbani, 2008).



Cognizant with the children's welfare, many reforms and measures has been promoted by the government based on its promise that the "governments will set up child activity centers and organized programs that provided care and protection to children at risk of being abused and also conducted child development and parenting courses for the community" (CA, 2001). Thus, by virtue of CA 2001, the Court for Children is established and empowered to order the child in- need of care, protection and rehabilitation to be placed in a safety place. In determining the order to be made, the Court for Children shall treat the best interest of the child as the paramount consideration. It also provides for a procedure before the Court of Children in terms of administration of justice (Jal Zabdi, 2008). It should be noted that the power was also given to the Court for Children to order parents of guardians of the child to attend interactive workshops to enable them to establish a positive relationship and mutual understanding in overcoming their problems towards building a harmonious family. However, programs that have been conducted at the girl's rehabilitation centers were not really effective due to certain reasons such as unqualified counselors, unattractive moral class and the exposure to physical environment which was not conducive (Azizi, Mohd Anuar, Abd Rahim & Yusof, 2001).

On top of that, it is noted that the CA 2001 does not give the courts the power to sentence a juvenile convicted of murder. Consequently, the implementation of CA 2001 has been criticized as being unfair to the children's wellbeing especially which relate to death penalty and suggested further reform. Under the CA 2001, the law prohibits the death penalty for a child offender and imposes imprisonment as the penalty in substitution for the death sentence. In response to the proposed amendment of the CA, it had been pointed out by the relevant Minister that doctors in private sectors, teachers and care givers would be required to report on the misconduct on children under the proposed amendments to Child Act. Hence, a national workshop was organized in 2005 by the Ministry of Women, Family and Community Development in order to discuss the amendment. Furthermore the Coordinating Council for the Protection of Children (CCPC) was set up as well as the National Advisory and Consultative Council for Children (NACC). The Council was responsible to advise the government in matters relating to the policy and programs in line with UNCRC and National Plan of Action for Children (NPAC). In addition, the establishment of Child Protection Team; the District of Child Welfare Committees; institutional care for the children through the DSW and Family System's Children Homes (*Rumah Tunas Harapan*) was part of the government's measures to address child abuse and neglect (Khadijah & Mohamed Fadzil, 2008).

Collaboration among various stake holders in reviewing problems and identifying strategies and future work plan with regards to issues relating to children was promoted through the MWFCDD. The establishment of inter-sectoral Suspected Child Abuse and Neglect (SCAN) teams at district and state hospitals and the institution of a 24 hour toll-free hotline for reporting child abuse cases are part of the government measures in protecting children from abuse (Ann & Khadijah, 1997). Furthermore a Witness Support

Service (WSS) was introduced to protect all child witnesses or victims of abuse attending courts proceedings in Kuala Lumpur.

Despite various measures that had been addressed by the government, child abuse cases are still alarming and escalating. It is difficult to change people's attitude in dealing with child abuse and neglect although the punishment has been severe. Although Malaysia's development policies and plans of the last 53 years are numerous in number, it does not include comprehensive child protection measures to ensure the rights, care and protection of all children in the country. The current legal provisions cannot give full protection to children who are exposed to family violence and heinous crimes within society. There is always a challenge in providing good and effective support for the children in the context of child abuse and neglect. Due to traditions and cultural limitations, attitudes and mindsets become the main obstacle in addressing the problems of abused children.

It is noted that people who dealt with children were somehow reluctant to report any signs of abuse to the authorities (Jal Zabdi, 2008). Therefore the Child Protection Policy was introduced by the MWFC as the latest mechanism in dealing with child abuse and neglect and missing children. Therefore, all organizations dealing with children including schools, nurseries and tuition centre are required to adopt the Child Protection Policy to prevent child abuse and neglect. In this regards all workers and volunteers would be screened before being employed to work in all organizations involving children. Furthermore, all child minders and teachers need to be trained to look out for warning signs of abuse as required by the Child Protection Policy 2009.

### **Child Care**

As has been stated earlier, there are two important laws which governed the child below the age of 4 years old namely Child Care Centre Act 1984 (CCCA 1984) and the Child Care Act 1993 (CCA 1993). The quality of alternative childcare for children below the age of four years is governed by the CCCA 1984. The CCA 1993 provides for the registration, control and inspection of day and residential care centres. Any care centre which provides care for four or more persons over a continuous period of more than three hours per day and at least three days per week whether for reward or otherwise, is required to be registered under Act 1993. It has been planned to expedite the process of placing children and to upgrade the conditions in such centers. However, due to the misconduct of child minders and teachers in the child care whom had negligently caused the child death, the call for an amendment of the CCCA 1984 started in 2006. The proposed amendment are based on the grounds that children' safety, quality of care and the training of child minders in the Malaysian child daily care centre are at stake.

Therefore, both the CCCA 1984 and the CCA 1993 have been amended in 2006 to cater the needs of children below the age of four within the child care centers. The amendment is to facilitate the registration of child care centre, to diversify the types of child care centres which include child care at workplace and community childcare and at the same time empower the Director of Department of Sosial Welfare (DSW) in the registration process of child care centres. The amendment law requires that all child care centres shall be registered with the DSW and the DSW are given the power to monitor the operation of the centres. The law also emphasizes that all care providers must obtain the basic Childcare Certificate accredited by the DSW together with the additional training in Early Childhood Care and Development. It is expected from the amendment that there should be a positive impact on child development and also to protect the interest and safety of children at child care centres. At the same time it empowers the DSW to penalize the unregistered childcare centres and at the same time to penalize to non-compliance of the law and encourage the childcare operator to register with DSW. Under the CCA 1984 (Amendment 2007), the Department of Social Welfare is responsible in monitoring the operation of the child care centre to ensure compliance with the CCCA (Amendment 2007). The Act stipulates that all child care providers must obtain Certification on Registration of Child Care Centre accredited by the DSW. In ensuring the quality of child care centre, the DSW is supported by other departments such Health Department, Fire and Safety Department and Local Authority which monitor the administration of the centre.

Instead of the above acts, the application of Workers Minimum Standard of Housing and Amenities Act 1990 under the jurisdictions of Department of Labor is also relevant. These legislation and its reforms exemplify governmental concern and responsibility in matters relating to children's care and development. The above acts set minimum standards in relation to location, administration, parental involvement, health, food and nutrition, safety, toilet facilities, water supply, furniture and equipment and other related considerations. It is noted that the child minders and child care providers in Malaysia have to be registered with the Association of Registered Child Care Providers Malaysia (hereinafter referred to as ARCPM). The ARCPM is the national NGO registered with the Registrar of Societies and ensures the quality of alternative child care for children in Malaysia. Hence, basic child care course has to be registered by the child minders as a compulsory certification by the DSW for all child care providers.

The introduction of early child care policy and the amendment to the CCCA do not guarantee the children's safety at the child care centre if the responsibility is not really fulfilled by all people dealing with children. In this situation, normally the parents would sue the child centres for their negligence (Berita Harian, 2008). The problem here is due to lack of monitoring from the authorities in ensuring the safety of children. It has been reported that the authorities tend to see the day care centres as a business enterprise where a permit has to be renewed on a yearly basis (Utusan Malaysia, 2008). Currently,

the issue of child safety at the child care centre is crucial. In one of the latest empirical research conducted in Malaysia, the parents were not satisfied with the safety at child care centres (Rosenah, Khor & Zoharah, 2008). They perceived that children were exposed to at least one safety hazard at the child day care centre. They were also dissatisfied with the child care providers who were inexperienced in handling injuries and always exhibited negative attitudes toward the safety of children at the child day care centre. It has been suggested the corrective action has to be thought seriously by the child care operators and child care providers; frequent inspection; fully trained and experienced child care providers; periodic in-service training; orientation of child care providers to injuries and a heavier penalty for child abuse. Nevertheless, non-punitive humanitarian approach is preferable.

According to Chiam (2008), it is a requirement under the CCCA 1984 (Amendment 2007), that physical inspection by the officer from the DSW shall be conducted thoroughly in all aspects however this process might not be operative due the existence of numerous child care centres in Malaysia. It is noted that instead of complying with the regulations as stipulated in the CCCA (Amendment 2007), the responsible person in the child care centre are required to follow the guideline in handling children in child care centre and pre-school. This guideline generally covers health care at the child care centre. The concern over the position of child has been expressed by the child experts that the CCCA (Amendment 2007) hardly provides for the promotion and delivery of quality child care. The amendments are more for the administrative purpose rather than for the assertion of quality child care as they include the increase in categories of child care centres; the licence to operate a child care centre which is to be issued and the display of the licence in a conspicuous place in the premise. Currently the National Permata Policy has been implemented at government kindergartens and nurseries for children under 4 years old. It is noted that the emphasis of the National *Permata* Policy is on the early childhood care and education at the rural areas which cover lower socio-economic background and multi-races. Furthermore, early childhood development programs for children aged 4 and below (PERMATA) will be rolled out after impact assessment.

In the Mid-Term Review of the Ninth Malaysia Plan, it was reported that child safety still remains a priority (EPU, 2008). Therefore, the amended Child Care Centre Act 1984 which among others enables the authorities to seal premise which is not in compliance with the Act will be enforced to enhance the quality of the childcare centre seems a viable solution to show the level of government's seriousness in implementing the law which deal with child care in Malaysia. The above discussion proves that the current legal provisions on child care is somehow lacking in terms of stipulating the comprehensive protection for children under 4 years old. Nonetheless, it is anticipated that the new National Child Policy and National Child Protection Policy 2009 could be better protection to children in child care setting which emphasis the principle of best interests.

## **Policies Changes in Education and Children's Best Interests**

Although the earliest law on education was introduced in 1961, it took almost 35 years to be replaced by the Education Act 1996 (EA 1996). It is noted that despite the reservation on article 28 (1) (a) of UNCRC, the education policy and law in Malaysia has changed. The EA 1996 provides a comprehensive legal framework for Malaysian educational system, curriculum and human resource for education pre-school to university. As the Education Act 1996 was enacted to strengthen the policy education on Malaysian children, one of the important features in the EA 1996 is pertaining to the equal rights for education among Malaysians in order to maximize their potential. It is also emphasized in the EA 1996 that pre-school curriculum shall be applicable in all preschool in Malaysia. In addition, the Education Act 1996 was amended which emphasized that primary education was compulsory for all children starting the age of 6. The new insertion of section 29A of Education Act determined the power of Minister of Education to order compulsory education in Malaysia. Consequently, starting from 1<sup>st</sup> January 2003 the Ministry of Education had enforced compulsory education at primary school for Malaysian children otherwise they would be penalized under the Education Act 1996. Instead of introducing a policy of compulsory education for all Malaysian children, it is a requirement under the law for school registration that the birth certificate is to be produced before the officer. If the child failed to produce his or her birth certificate, he/she would not be permitted to register for school.

The educational rights for all Malaysian children in Malaysia are expected to be improved through the Education Development Master Plan 2006-2010. One of the aims of the master plan is to ensure all children have the opportunity of education in terms of access, equity and equality. Thus, the MWFC and Department of National Registration are responsible in collecting information pertaining to vulnerable children who do not have personal document in order to facilitate the official work including school registration. In implementing this policy the MoE announced that every child is allowed to enroll in secondary school although he or she does not have a birth certificate, provided one of the parents is a Malaysian citizen. This latest policy shows that birth certificate is not the main requirement in the Malaysian education system as practiced in the secondary school as before. Nonetheless the implication of this policy is not clear since it is at the early stage.

On top of that, in the absence of special act to govern the need of education for the special child in Malaysia, more educational opportunities for children with special skills have been enhanced by providing special classes in regular schools to enable them to adapt to the school environment. However, when the Persons with Disabilities Act 2008 (PDA 2008) was passed recently as a response to the demand from various representative and inter-agencies with cross disabilities, it contained provision on right to access to education for children with disabilities. The PDA 2008 states that;

“Person with disabilities shall not be excluded from the general education system on the basis of disabilities, and children with disabilities shall not be excluded from pre-school, primary, secondary and higher education on equal basis with persons or children without disabilities, including vocational training and lifelong learning”.

In essence, it is reasonable to say that this provision has strengthened the special education policy for special children in Malaysia that has been already stated in the Education Act 1996 and the Special Education Rules 1997. Overall, children's best interest has been protected through education despite several challenges.

### **Policy Implications**

The ratification of UNCRC in 1995 was transparent evidence from the government in ensuring the welfare of Malaysian children were protected through domestic laws and comply with the international conventions. Post 1995 period focused on improving the loopholes in the existing legislations that caused injustice and inefficiency in the implementation process. During post-1957, laws pertaining to children began to be revised and amended in order to improve further on their welfare.

### **Family Law**

The right of an adopted child was protected through the amendment of Adoption Act 1952 and Registration of Adoption Act 1952. Besides that, the welfare of children in the event of parental divorce was revised in the case of non Muslim children. Thus, the amendment of Guardianship of Infant Act 1961 was to give equal rights for guardianship for both father and mother. In another development, the right of an infant in the child care centres was also protected by the amendment of Child Care Centres Act 1984 and Care Centres Act 1993. The only act that was passed after 1995 was the Child Act 2001 but was still in the process of amendment. The amendment of laws affecting children in post 1995, were to respond to the social change and upholding the principle of the best interest under the law of guardianship, education, inheritance. Nonetheless, in the case of child adoption, the principle of Islamic law with regards to child identity in the case of illegitimate child had been ignored by the authority in addressing the social demands. This procedural law of adoption which was available for Muslim would cause further implications in the future as regard to child's identity.

It is noted that Islamic principle of *Shari'ah* has been upheld by the Shariah court in Malaysia, despite rigid interpretation as regard to interpret the welfare of a child in child custody dispute. The traditional presumption theory that mother is the best person for the custody of a child, will not be relevant in the case of one parent convert to another

religion (Najibah, 2007). Therefore, it is suggested that the court could resolve the issue by adopting other opinions as recognized by *Hukum Syara'* which is for the best interest of the child. There was a reform under Islamic family law with regard to the maintenance of a child, where the age of a child to receive child support had been extended after eighteen years. However the Law Reform Act 1976 was still silent on this matter although it had been brought to the attention of the civil court. The Shariah court also had been given power to order the payment of maintenance to other male members in the family. Otherwise, the role is transferred to *Baitul Mal* (Nora Abd Haq, 2007). This reform had directly brought significant changes for the welfare of Muslim children.

In another development, the notion of joint custody is seen as a symbolic status which is designed to reduce conflict between parents by preserving both parental rights towards children in the event of divorce. As the idea of joint custody is a way of overcoming the emotionally loaded concept of custody with its implied exclusion of one parent, it is seen as a way of equalizing the position of father and mother. Therefore, the promotion of joint custody arrangement as overwhelmingly practiced in Western jurisdiction can be applied in Malaysia with consideration to the domestic context. It is suggested that that both family laws should explicitly authorize joint custody and encourage frequent contact with both parents in the event of divorce. Since it is proven that parent-child relationships after divorce could bring negative impact on children's wellbeing, joint custody is the best approach in ensuring the best interest of the child. Thus, the legislator could make a move in this regard because it has been discussed and debated in length by the Malaysian academician and legal scholars long ago. It is suggested that Family Child Court be established in Malaysia as like Singapore with due consideration to the setting up of Family Court which is long overdue. Currently, a good and wise solution could not be given with regards to the status of children in the case of parental conversion to Islam due to the conflict of *hukum syara'* with the applicable laws. Therefore, it is crucial for the policy maker to expand the scope of reference and allow for the reconstruction of *fiqh* through *ijtihad*. There is also a critical need to review the current laws which deal with jurisdictional conflict of both civil and Shariah courts. If these laws could be reconciled, perhaps it might improve the legal impact of provisions on children's best interests in the case of conversion of one parent to Islam. Thus the government should regulate laws that promote and provide co-parenting after divorce and joint custody

Since Malaysia is applying dual legal systems, the best interests of the child are compatible to be used in both courts. It is established that both civil and Shariah courts uphold the child best interest. What is important for the Malaysian judges are that they are willing to depart from their traditional approach in interpreting the best interest principle of children. Although there is no yardstick in interpreting the best interest principle, Muslim judges can refer to Islamic principles because Islamic law is beyond those classical rules. Since *sulh* has been accepted as the best approach in dealing with family issues, this

can be further explored in the Shariah Courts. Meanwhile ex-parte application shall be avoided in the case of child custody. The duty to protect child best interest has been placed on parents as part of *maqasid al shari'ah*. Thus, parental responsibility should be emphasized within the family system. In this regard, more efforts can be done by family members especially parents and extended families in order to cultivate the sense of social, legal and religious obligations towards children.

Since many Parenting Modules have been developed by LPPKN to create parental awareness among public, this can be utilized effectively throughout Malaysia, both, for Muslim and non Muslim parents. This action will avoid future conflicts between parents in the event of divorce. It is noted that actions towards this end are easier said than done. Nonetheless it could be done slowly and over a period of time as it would involve the intrinsic values and beliefs of the individuals and communities. This could be done through continuous efforts and specialized skills that can transform cultural behaviors and belief. Thus, a holistic parental policy which promotes the concept of *maslahah* between parents despite their conflicts would become a better suggestion. It is suggested that the government should formulate policy that promote co-operation between parents in the event of divorce

In the event of divorce, women in Malaysian have difficulty in ensuring the compliance of court's order whereby the ex-husbands escape their obligation due to the lack of monitoring mechanism and enforcement procedure. Therefore, it causes hardship to many single mothers. As the implementation of laws which pertains to maintenance of children in the event of parental divorce is a major challenge in Malaysia, Family Support Unit was established by the government using models from other Muslim countries (Mohd Naim, 2010). It is anticipated that problems on child maintenance could be overcome through the establishment of Child Support Unit. There should be a regulation of a more effective mechanism in the implementation of law related to maintenance such as creating a system like the Family Fund as being practiced in Egypt. However, this would definitely need exploration through empirical research.

The above discussion proves that in the absence of family-focused policy, children's rights and their welfare had been protected through diverse legislations in family law which comprises different aspects including adoption, child support, custody and guardianship. Taking into considerations that family policy is important to become the backbone in addressing family issues, the government has formulate the National Family Policy in 2010 to become the blueprint for family services encompasses housing, education, health and community development. It took almost 53 years to have family policy in this multiracial country.



## **Child Protection**

The ratification of UNCRC had positively changed the legal development in relation to child protection. Although the introduction of Child Act 2001 was marked as an important agenda for upholding child best interest to be in accordance with the UNCRC 1995, the loopholes and weakness need further improvement (Azizah, 2007). Although the principle of children's rights is not clearly stipulated in the Malaysian Constitution, the formulation of various social policies and laws are much better if compared with other Muslim states like Egypt and Jordan (Rojanah, 2010).

The national economic and social policies in Malaysia provide a relatively favorable environment for children's development and protection of their rights, but the domestic laws in sometimes do not always translate into justice. It can be linked to many structural factors which include the implementation, monitoring and enforcement of Malaysian policy and laws related children and at the same time affect the rights of children to access for justice. A lot of workshops and conferences been organized in order to find good solution in addressing children's issues. Currently, the National Child Protection Policy was introduced in 2009 as comprehensive measures to protect Malaysian children as the cases on crimes against children has escalated as revealed by the statistics from hospitals, police and social welfare department. At the same time the National Child Policy was introduced to give comprehensive safeguard to all Malaysian children encompasses their survival, development, protection and participation (NCP, 2009).

## **Conclusion**

The above study reveals to us that the formulation of core development policy in Malaysia particularly after the independence has been focusing on the physical development without neglecting the needs of younger generations. It is evident that the core development policies has been used as stimulating factors in achieving the social target especially with regard to children's best interests. In order to strengthen the implementation of the core development policies, children's matters have been embedded in various social policies. Nonetheless, the existence of diverse social policies could not really address the best interest of Malaysian children, as the implementation of those policies, have somehow redundant between agencies. It is revealed that in the absence of child-focused policy in Malaysia, a comprehensive protection for children cannot be achieved. This article also reveals that Malaysia's development policies and plans of the last 53 years have not included comprehensive child protection measures in which served the best interest of the child. This could be linked to the phenomena of 'instant policy' that has been formulated due to the current needs of the society. To a certain extent, some issues which are related to child has been politicized which has led to the rejection of proposed plans. Furthermore some legislative reforms failed to consider the best interest

of the child from child's perspective especially in the case of shared parenting in the event of divorce. In conclusion, this article highlights the importance of focusing on the child's right from child's perspective in order to uphold his or her best interests. Child-focused policy is important in guiding the authority to formulate plan of actions that can serve and accommodate children's best interests. Furthermore protecting children with regards to their life, religion, dignity, intellect and property can be used as a foundation theory in dealing with children's welfare and best interests. It is anticipated that the National Child Policy and National Child Protection Policy would bring positives changes to the Malaysian children in holistic manner.

## Bibliography

- Abd Aziz Othman Altwaijri. (February, 2009). "Children's Rights" Speech delivered at Second Islamic Conference on Ministers in Charge of Childhood, Kartoom Sudan. Availabe online at <http://www.isesco.org.ma/english/confSpec/MinistersEnfa/Document/%20Adress%opening.pdf> viewed on 30th October 2009.
- Abd Ghafur Hamid. (2007). Reservation to CEDAW and the implementation of Islamic family law: issue and challenges. Proceedings of the International Family Law Conference, (pp 145-166). Kuala Lumpur: IIUM.
- Abdullah Nasih 'Ulwan, (1988). Pendidikan Anak-anak dalam Islam. Jilid 1 dan 2. Singapura: Pustaka Nasional Pte Ltd.
- Abdullah Nasih 'Ulwan. (2001). Tarbiyyah al Awlad fi al Islam. English translation by Muhammad Mahmud Ghali Ahmad Shafiq al Khatib, Muhammad Kamal al-Din al Ghani 'Ali Ahmad Sha'ban and Muhammad al Sa'ati Al Qindi. (1st ed.), Dar' al Salam.
- Aishah Edris. (1997). Dasar Sosial. In Asnarulkhadi, A.S & Jayum, J. Kenegaraan Malaysia (pp 201-211). Serdang: Universiti Putra Press.
- Aneeta Kulasegaran. (1996). The Conventions on the Rights of the Child: Malaysia's 12 Reservations. Proceedings of the Seminar Understanding the Convention on the Rights of the Child (pp 42-47). Kuala Kumpur.
- Azizah Mohd. (2007). Pengangkatan dan Pemeliharaan Anak. In Najibah, Mohd Zin et.al. Undang-undang Keluarga (Islam), Siri Perkembangan Undang-undang di Malaysia (pp 282-351). Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Azizi, Y., Mohd Anuar, Abd Rahim, H. & Yusof, B. (21st - 25th May, 2001,). Program Pemulihan Akhlak Wanita: sejauhmanakah keberkesanan Pusat Perlindungan Wanita Membantu Proses Pemulihan. Paper presented at Persidangan Kebangsaan Pendidikan Moral dalam Dunia Globalisasi, University Malaya.
- Chiam, H. K. (2008). Child Care in Malaysia: Then and Now. International Journal of Child Care and Education Policy, 2(2), 34-51.
- Detrik, S. (1999). A Commentary on the Convention on the Rights of a Child. London: Martinus Nijhoff Publisher, at 85-94.

- Economic Planning Unit. (2009). The Mid Term Review of the Ninth Malaysia Plan. Prime Minister Department: EPU.
- Eva Brems. (2001). International studies of Human Rights. Kluwer Law International.
- Faiza Thamby Chik. (2007). Keynote Address for International Family Law Conference organized by Department of Islamic Law, AIKOL, IIUM and Department of Shariah Judiciary Malaysia, 16th – 17th January.
- Fatimah Hamidon. (13-14 December, 1999). Dasar Wanita Negara dan Pelan Tindakan Wanita. Paper presented for Workshop on 'Wanita dalam Pembangunan Menghadapi Cabaran pada dekad akan datang. Kuching, Sarawak.
- Fortin, J. (2005). Children's Rights and Developing Law (2nd ed). London: Butterworths.
- Habib Mat Som & Megat Ahmad Kamaludin, MD. (2008). Globalisasi dan Cabaran Pendidikan di Malaysia, Masalah Pendidikan, 31(1), 91-101
- Jal Zabdi Mohd Yusoff. (5-7th August, 2008). Child Protection Laws in Malaysia: The Changing Trend. Paper presented at the 6th International Malaysia Studies Conference, Crown Plaza Riverside Hotel, Kuching Sarawak.
- Kammerman, S.B. (2002). Early Childhood Care and Education and the other family policies and programs in South-East Asia. France: UNESCO.
- Khadijah, A. & Mohamed Fadzil, C. D. (2008). Penderaan Kanak-kanak: Cara Mengatasi. ISM Research Monograph, Series No 6 Versi 1, December. Kuala Lumpur: ISM.
- Mohd Fadzli Fadhilah. (2006). Fertility Crisis in Malaysia?. Bernama, 25th September.
- Mohd Hazim, S & Phua, K.L. (eds) (2004). Public Policy, Culture and the Impact of Globalization in Malaysia. Selangor: MSSA.
- Mohd Naim Mokhtar. (9th October, 2010,). Peranan Bahagian Sokongan Keluarga dalam Menangani Isu-isu Berkaitan Nafkah. Paper presented for Seminar Isu-isu Mahkamah Syariah ke 11 organized by Kulliyah of Laws IIUM and Persatuan Peguam Syarie Malaysia at IIUM, Kuala Lumpur.
- Najibah Mohd Zin. (2005). How the best interests of the child is best served in Islamic law with special reference to its application to the Malaysia Shariah Courts, IKIM Law Journal, 9(1), 323-347.

- Najibah Mohd Zin. (2007). Resolving conflict in family disputes involving conversion of a spouse to Islam under the Malaysia law. *The Law Review*, 66
- Nik Azis Nik Pa. (1994). *Penghayatan Wawasan Pembangunan Negara*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Noor Aziah Mohd Awal. (2007). The Internal Conflicts in Family law: 50 years after independence of Malaysia. In Anisah Che Ngah, Rohimi Shafie, Sakina Ahmad Yusof, Rahmah Ismail & Shamsudin Suhor (eds), *Undang-undang Malaysia: 50 tahun merentasi zaman*, Bangi (pp 149-174), Fakulti Undang-undang: Universiti Kebangsaan Malaysia.
- Nora Abd Haq. (2007). Jaminan nafkah anak. In Najibah Mohd Zin et.al. *Undang-undang Keluarga (Islam). Siri Perkembangan Undang-undang di Malaysia* (pp 257-281). Kuala Lumpur: Dewan Bahasa and Pustaka.
- Norasmaliah Ismail. (2000). Hubungan bapa-anak selepas perceraian. Unpublished academic exercise. Department of. Human Development and Family Studies, FEM:UPM.
- Norasyikin Hamzah (2006). "Impact of Divorce on Children's Welfare: A Pilot Study on Children Living with Single Mothers in Selected Rural Areas in Selangor". Unpublished Master Dissertation. International Islamic University Malaysia, Kuala Lumpur.
- Norbaini Mohamed Nazri. (2008). Protecting Child Victim in Malaysia, In Wing Cheng Chen (ed). *Support for Victims of Crime in Asia* (pp 291-300). London: Routledge.
- Normi Abdul Malek. (2007). Hadanah. In Najibah Mohd Zin et.al. *Undang-undang Keluarga (Islam). Siri Perkembangan Undang-undang di Malaysia* (pp 177-215). Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Prout, A. (2005). *The Future of Childhood: towards the interdisciplinary study of children*. London: Routledge.
- Raihanah Abdullah. (2006). Undang-undang Keluarga Islam di Malaysia: Satu sorotan literatur. In Ahmad Hidayat Buang (ed). *Mahkamah Syariah di Malaysia: pencapaian dan cabaran* (pp 125-138). Kuala Lumpur: University Malaya Press.
- Raj Karim (1993). Malaysia Country Paper- profile of the family in Wan Fortila Hamzah (ed), *Family and the Environment- The Challenges of Our Times*, PPSEAWA Regional Conference, at 43

- Ringen, S. (1988). *The Possibility of Politics*. Kuala Lumpur: Oxford University Press.
- Rojanah, K. (2010). *A Study on Policies and Laws Affecting Children in Malaysia: an appraisal of the children's best interests*. Unpublished PhD Dissertation, International Islamic University Malaysia: Kuala Lumpur.
- Rosenah, J. Khor Pua, H & Zoharah, O. (2008). Parents' view on interpretation of safety. *Journal ARAHE*, 15(2): 43-50.
- Rozumah. B., Siti Nor, Y, Abdullah Al Hadi & Rojanah, K. (1999). *The Impact of Changing Family Structures on Children's Lives*. IRPA Report. UPM: Faculty of Human Ecology.
- Rumaya, J. & Siti Nor, Y. (2007). *Isu Keluarga Kontemporari*. Kuala Lumpur: Inreach Edition.
- Salleh Buang. (2007). *Trend Semasa. Siri Perkembangan Undang-undang di Malaysia*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Sayed Abdul Rahman Sayed Mohamad. (1996). *The Implementation of the Convention on Rights of a Child: How do we make it work? Proceedings of the Seminar Understanding of the Convention of the Rights of a Child (pp 15-23)*, Kuala Lumpur.
- Sham Kassim. (2001). *Child Abuse in Malaysia*. In Beth, M.S., Mc Cauley, M. & Epstein, M.A. *Child Abuse: A Global View (pp 132-140)*. Greenword Press.
- Shamsudin Suhor. (2007). *Anak angkat dan pengangkatan*. In Shamsudin Suhor & Noor Aziah Mohd Awal (ed). *Undang-undang Keluarga Sipil. Siri Perkembangan Undang-undang di Malaysia (pp 45-57)*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Siti Hajar Abu Bakar. (2002). *Pengantar Dasar Sosial di Malaysia*. Kuala Lumpur: University Malaya Press.
- Siti Zaharah Sulaiman. (10th May, 2002). Statement delivered during the 27th Special Session of the United Nations General Assembly on Children at the United Nation, New York, Available from <http://www.un.org/ga/children/Malaysia.html> viewed on 2nd January 2006.
- Sridevi Thambapilai. (2010). *Non Muslim Maintenance Laws in Malaysia*. Paper presented for Seminar Internasional 2010 – 'Progressive Development of Marriage Law', Universitas Pancasila Jakarta.

- Sridevi Thambapilai. (5-7th August, 2008). Right to Maintenance: a right or a Façade?. Paper presented for 6th International Malaysian Studies Conference (MSC6), Kuching Sarawak.
- Suad, J. et.al. (2005). Encyclopedia of Women and Islamic Cultures: Family, body, sexuality and health (Vol 5). University of California.
- SUHAKAM. (2004). Report of the Roundtable Discussion on Convention on the Rights of the Child. Kuala Lumpur: Human Rights Commissions of Malaysia.
- Sujata, B. & Yong, C.M. (2004). The Distribution(Amendment) Act 1997- Amendment to section 6 of the Distribution Act 958. Journal of Malaysian Comparative Law, 3, 107-131.
- Tie Fatt Hee. (2002). Undang-undang Pendidikan di Malaysia. Kuala Lumpur: Penerbit Fajar Bakti.
- Titmus, R. (1974). Social Policy: an introduction. Allen and Unwin.
- Van Buereen, G. (1995). The International law on the Rights of the Child. Martinus Nijhoff Publishers. International Studies of Human Rights, at 35
- Veerman, P.A. (1992). The Rights of the Child and the Changing Image of Childhood. London: Martinus Nijhoff Publishers.
- Verhellen, E. (2006). Convention on the Rights of the Child: background, motivation, strategies, main themes. 4th Ed. Garant Publisher.
- Wan Azmi Ramli. (1993). Dasar Sosial di Malaysia. Kuala Lumpur: Golden Book Store.
- Wan Izatul Isma & Junaidah. (2008). CEDAW and the Law in Malaysia. The International Journal of Environmental, Cultural, Economic and Social Sustainability. Vol 4(4), 65-67.